

STATE OF MINNESOTA

**OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF NATURAL RESOURCES**

In the Matter of Permit Application No.
2003-1185 of Hidden Haven Homeowners
Association

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on October 6-8, 2004, at the Cass County Courthouse and Annex, Walker, Minnesota. The final reply brief was received on November 17, 2004, on which date the OAH record was closed.

William G. Peterson, Peterson Law Office, P.A., 3601 Minnesota Drive, Suite 800, Bloomington, MN 55435, appeared on behalf of the Applicant, Hidden Haven Homeowners Association, Inc. (the Applicant or Association). David P. Iverson and Jill Schlick, Assistant Attorneys General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2130, appeared on behalf of the Department of Natural Resources (the DNR or Department).

Association members Norm Card, Dean Nordby, Randy Pelletier and John Jaruszewski; neighbors Jeanette Welch and Jerry Bader; James Murphy, a local fishing guide; Willis Hoyt, the engineer with Landecker & Associates, Inc. who designed the harbor; and expert witness Dick Osgood testified on behalf of the Association. DNR Area Hydrologist Kirk English, DNR Area Fisheries Supervisor Harlan Fierstine, DNR Area Wildlife Supervisor Rob Naplin, and John Sumption, Assistant Director of Cass County Environmental Services, testified on behalf of the DNR.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Gene Merriam, Commissioner, Department of Natural Resources, 500 Lafayette Rd., St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the

presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUES

Whether the Applicant has met all of the conditions specified in DNR rules for the grant of a permit to construct an inland harbor on Leech Lake.

The Administrative Law Judge concludes that the Applicant has not demonstrated compliance with all the rules and that the denial of the application should be affirmed.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

The Application and Denial

1. Hidden Haven Homeowners' Association, Inc. (the "Association") is a Minnesota corporation whose members own property in Hidden Haven. Hidden Haven is a platted subdivision on the shore of Leech Lake in Cass County, Minnesota. Ownership rights and use of property in Hidden Haven are controlled by a Declaration of Covenants, Conditions and Restrictions adopted January 18, 1994.^[1]

2. On March 21, 2003, the Association filed an application with the DNR for a permit to construct an inland harbor on Hidden Haven.^[2] On July 15, 2003, the DNR Division of Waters ("DNR staff") denied the application, finding that the proposed inland harbor did not meet requirements in several applicable rules.^[3] On August 5, 2003, the Association requested a hearing on the denial and posted the required bond.^[4]

3. On the application, the stated purpose of the project is, "We propose to create a safe harbor for our boats. Wind and floating bogs have caused considerable damage to boats, docks and shore in the bay." In the "Sequencing Considerations" section of the application, the Association listed the alternatives considered as:

- 1) Construct an in-lake harbor with breakwaters (creates navigation hazard and would be unsightly)
- 2) Install 30 seasonal boat slips (unsightly, provides no protection from waves and floating bog)

3) Do nothing. Launch boats from trailers each day (forfeits riparian rights and is unsightly)^[5]

4. In an order dated July 15, 2003, the DNR denied the application and listed six reasons for the decision:^[6]

a. The harbor would permanently and unnecessarily alter the shoreline of Leech Lake, contrary to the goal of minimizing change or damage to the environment in Minn. R. 6115.0200, subp. 1.A.

b. The harbor does not satisfy the requirements of Minn. R. 6115.0200, subp. 5.C. and F., because it is not the minimal impact solution with respect to other alternatives and does not affect the waters and surrounding shorelines to the minimum degree feasible and practical.

c. The harbor is not consistent with Minn. R. 6115.0200, subp. 5.I. and J., because it would violate the Cass County Land Use Ordinance that prohibits the construction of a harbor in a wetland and does not allow a harbor to extend more than 200 feet landward from the ordinary high water level.

d. The harbor does not comply with Minn. R. 6115.0200, subp. 5.K., because it provides more than one mooring space per riparian lot.

e. The harbor is inconsistent with Minn. R. 6115.0201, subp. 5.C., because wind, wave, or current conditions, lake bed and bank conditions, or obstruction to public use do not preclude the use and maintenance of docks or an offshore docking system. In particular, the site is not exposed to an open water fetch (the distance traversed by waves without obstruction) of a magnitude sufficient to create wind and wave conditions that require a harbor. Moreover, shallow water depth and the extensive emergent vegetation help to dissipate wave action.

f. The harbor is inconsistent with the part of Minn. R. 6115.0201, subp. 5.E., that requires inland harbors to comply with Minn. R. 6115.0201, subp. 5.C.^[7]

Boy Bay of Leech Lake

5. Hidden Haven is located on Boy Bay, which is located on the east side of Leech Lake. Boy Bay, and Headquarters Bay to its south, form a body of water that is almost entirely separated from the main body of Leech Lake by Bear Island and a large peninsula extending down into Leech Lake along the west side of Boy Bay and ending at Battle Point. This Boy Bay – Headquarters Bay body of water appears from maps to be about six miles from north to south and varying from one to three miles from east to west.^[8] Boy Bay is a shallow bay, mostly eight to ten feet deep, with some holes to 15 feet. It has mostly a soft, mucky bottom. It has stands of emergent vegetation, including one particularly large area of wild rice near its middle.^[9]

6. Hidden Haven is on the west shore of Boy Bay, near its north end. The shoreline there runs almost due north and south. Hidden Haven is 1,415 feet north to

south and extends westerly from the shoreline 1,117 to 1,192 feet at various points. The land is a few feet above lake level and nearly flat. Hidden Haven consists of Block 1 along the south end of the shoreline, Outlot A along the north 603 feet of the shoreline, and Block 2, which is the area west of Block 1 and Outlot A. The ten lots in Block 2 are not on the lake. Wetlands cover a large portion of Outlot A, especially to the north and east. Emergent vegetation grows along much of Outlot A's shoreline and the lake bottom along its shoreline is mucky, except at the very south end. From there on south, the bottom is sandy. Except for Hidden Haven and several cabins just south of it, and a very few cabins on the east side, the shoreland surrounding Boy Bay is natural and undeveloped. It is largely wetlands.^[10]

7. Most of the seven lots in Block 1 have been developed with seasonal or permanent homes. Six seasonal residences have been constructed on the ten lots in Block 2. One owner owns two lots in Block 1 and one lot in Block 2. Another owner own one lot in each Block.^[11]

8. Pursuant to the Association's Declaration of Covenants, Conditions and Restrictions, owners of the lots in Block 2 each hold a non-exclusive easement "for ingress and egress over Outlot A for the use and enjoyment of said Outlot A for boat and pedestrian access, parking and general recreational use." Thus, they have riparian rights on Outlot A.^[12]

9. The owners in Block 1 use seasonal docks and some boat lifts in front of their homes and will continue to do so even if an inland harbor is built. On the south end of Outlot A, a gravel driveway goes from the main road, around a small wetland area (about 55 by 42 feet, or about 2310 sq. ft.), and across the south side of Outlot A to the shoreline. Some Block 2 owners install two seasonal docks beside the end of the driveway for mooring their boats. Because the slope is gradual and the lake bottom more firm there, it appears that the driveway is used as a ramp for launching boats from trailers.^[13]

10. There are about a dozen cabins and homes just to the south of Hidden Haven, including the Point View "Resortaminium." Those owners use docks and boat lifts on their shores. Aerial photos show about 20 docks on Boy Bay at Hidden Haven and the properties to the south.^[14]

11. Leech Lake is the third largest non-border lake in Minnesota. There are 175 inland harbors on the lake, most of which were installed before DNR began regulating them. The last one approved by DNR on the lake was Phelps Harbor in 1996.^[15] There was an inland harbor at Point View, but that was sold to the DNR and is now used as a public access. Inland harbors are generally desired because they provide protection to watercraft from wind and wave action and to watercraft owners attempting to launch or land their boats in windy and rough water conditions.

Floating Bogs

12. Boy Bay has floating bogs, which is not unusual, especially in such a shallow, weedy body of water. Bogs are composed of lake vegetation that becomes matted together. Bogs can become quite large over several years and support plant growth of their own. They may become separated from the bottom or shore to which they attach, particularly in times of high water and storms. They then float about driven by wind, wave, and current action.

13. Boy Bay had one very unusual extremely large bog that was attached to the shore less than a half mile north of Hidden Haven. It was so large and old that it shows on maps of the area as a peninsula of land covered by wetlands.^[16] It appears from one map to have been about 1500 feet by 800 feet in size.^[17] That would make it about 27.5 acres. It has been estimated to have been more than 30 acres.^[18] It had brush and sapling trees growing on it.^[19]

14. In 1999 and 2001, the water level in Leech Lake was higher than normal.^[20] There was a major storm there on July 4, 1999, with tornado force straight-line winds that blew down trees on Highway 8, two miles east of Boy Bay. Boats on the lake and in inland harbors were damaged by the storm winds. The “30+ acre bog” broke loose and on July 5, 1999, moved out into the wild rice paddy in the middle of Boy Bay. It continued to move easterly and reached the east end of the bay, near the mouth of the Boy River, by the end of the month. It was apparently driven by the current in Boy Bay that flows toward the river or by the wind. There it broke into several pieces. The largest piece was about 15 acres, one was about five acres, three were one to three acres each, and there were several smaller pieces. The largest piece remained at the east end, but by August 12, 1999, the five acre piece moved back across Boy Bay toward Hidden Haven. It went south of Hidden Haven and struck and damaged what appears to be two or three docks and lifts, and a boat at the Point View Resort. By 2001, the five acre piece had moved back to the east end of Boy Bay and all the large pieces have remained near the north and east shores of the bay ever since. The largest piece is now down to about ten acres.^[21]

15. Floating bogs were also observed in Boy Bay in 2000 and 2001. Only one bog sighting was reported after 2001, near Bear Island in 2004. All the witnesses agreed that bogs typically begin floating free when there is high water.^[22] But a severe storm with extremely high winds will help detach bogs. DNR Area Fisheries Supervisor Harlan Fierstine noted that the July 4, 1999, storm, along with the high water at the time, freed up several bogs on Leech Lake and elsewhere, including another extremely large bog on nearby Boy Lake.^[23] Leech Lake is a reservoir, so the water levels are regulated and changes are not extreme. For the last twenty years the level has remained between about 1294 and 1295 feet above sea level, except for peaks in 1999 at 1295.81 and 2001 at 1296.09.^[24] The levels have been lower since 2001 and so has floating bog activity in Boy Bay.

16. The character of the water in Boy Bay is fairly unique in that it presently contains at least six floating bogs from one to ten acres in size. By its nature, Boy Bay

is likely to produce more floating bogs over time. When water levels rise in the Boy Bay, the combination of floating bogs of that size and even moderate wind, wave, and current actions, poses a significant threat of damage to docks, lifts, and boats in Boy Bay. Thus, the threat of bog damage in Boy Bay is somewhat greater than on the rest of Leech Lake or other lakes without such large floating bogs.

Wind Conditions in Boy Bay

17. Boy Bay, and Hidden Haven in particular, is sheltered from the prevalent northwest winds in the area and, compared to the main body of the lake, has fewer and lesser high wave conditions.^[25] Winds from the south, which is the direction of the largest open water, approach the shore from an oblique angle that lessens their impact along the shore. The shallow water depths and growth of emergent vegetation in Boy Bay tend to dissipate wave action.^[26] Muck bottoms like that in Boy Bay occur where calmer waters allow for solids suspended in the water to settle out onto the bottom of the lake. By contrast, the more windswept main body of Leech Lake has a gravel and cobble rock bottom due to the greater wind and wave action occurring on that portion of the lake.^[27]

18. As observed by the residents of Hidden Haven and Mr. Murphy, there have recently been about three significant storms each summer season that affect Boy Bay and Hidden Harbor, not including the July 4, 1999, storm that was particularly intense. The winds from such storms can come from any direction. Waves up to three feet high have reached the shore and caused relatively minor damage to docks, such as knocking out dock panel and bending dock parts. Boat lifts have been damaged by wind action.^[28] At least one boat, tied to a dock was damaged when the wind and waves scraped it against the dock.^[29]

19. The best climatological data as to storm frequency in evidence is a list of high wind events in Cass County since 1950.^[30] It is a printout of Dick Osgood's query of the National Oceanic and Atmospheric Administration's Climatic Data Center's U.S. Storm Events Database for thunderstorm and high wind events in Cass County. It lists wind events exceeding 50 knots (58 mph).^[31] The events listed since 1996 are more precise and list wind speeds at specific cities within the county. Five of those cities are near Leech Lake and wind events there could impact Boy Bay: Walker (0 miles), Whipholt (0 miles), Bena (4 miles), Longville (6 miles), and Cass Lake (9 miles). Since Cass Lake is a large county,^[32] some of the other cities are up to 50 miles from Leech Lake and storms there are not likely to affect the Lake.

20. There were three nearby high wind events in 1996. There were 70 knots (81 mph) winds on June 28, 1996, at Bena. There were 50 knot (58 mph) winds at Bena on June 29 and at Longville on August 21. In 1997 there were 55 knot (63 mph) winds at Longville on July 13 and at Walker on October 8. In 1998, there were 70 knot (81 mph) winds at Walker on August 16 and 50 knot (58 mph) winds at Longville an hour later. There were three nearby high wind events in 1999. The July 4, 1999, storm is shown at Walker with wind speeds of 61 knots (70 mph). There was a June 9, 1999, storm with wind speeds of 50 knots (58 mph) at Longville, Whipholt, and Walker and a

July 25, 1999, storm at Cass Lake with 50 knot winds. In 2000, there was one storm that had winds of 60 knots (69 mph) at Walker and winds of 50 knots at Longville. In 2001, there were nearby storms on July 17 and August 8 with winds of 52 knots (60 mph). In 2002, there were two nearby storms with winds of 50 knots at Cass Lake on June 13 and Walker on June 24. In 2003 there were no high wind events. Ex. 117 shows no nearby high wind events in 2004, but a recent query of the site lists a 60 knot wind event on September 23, 2004, at Walker.

21. Mr. Osgood estimated from the data that high wind events would take place 1.5 times per boating season on average. The NOAA Climatic Data Center data supports that opinion. While not all the wind events at the nearby cities were large enough to affect Boy Bay, some did. And it is likely that Boy Bay had a similar number of events as any of those cities. The data also supports the reported personal observations of two or three storms per year with high waves, since some of those storms may have winds of less than 50 knots (58 mph), but were still capable of producing large waves and causing the type of damage described. The data also shows that the July 4, 1999, winds speeds of 70 mph or greater were not as unusual as Mr. English and others assumed; there were two 81 mph wind events in the prior three years.

22. Mr. English is of the opinion that the suitability of docks should not be determined from wind and wave conditions in short-lived sporadic storms, but from wave heights determined from winds speeds over extended periods of time. In Mr. English's experience with winds, lakes, and docks in the area over many years, persistent wave heights of three feet or more are required to preclude the use of docks.

23. Wave height can be estimated from charts or from computer programs that model wind speed from wind speed, fetch length, and wind duration. The U.S. Army Corps of Engineers (USCOE) ACES model used by Mr. English uses the effective fetch, which is an average fetch measure over several degrees to eliminate irregularities in the land forms. In his experience with the model and winds in the area, persistent wave heights of over three feet are generated by effective fetches of over eight miles. At Hidden Haven, the longest effective fetch is 5.14 miles from the south. According to the model, that generates a wave height 2.21 feet after three hours of sustained 35 mph winds.^[33] Mr. English's modeling of a shallow water environment (7.0 feet), produced a maximum wave height of 1.56 feet in the same wind conditions.^[34]

24. Mr. English used a 35 mile an hour wind speed sustained for a three hour period because both the USCOE and the Natural Resource Conservation Service recommend that shore protection projects be designed to withstand winds that occur up to 95 percent of the time at the project location. Using wind data from the Bemidji area, which is about 20 miles from Leech Lake, Mr. English found wind speeds of approximately 35 mile per hour or less occur 95 percent of the time.^[35]

25. Mr. English did not do any calculations wave height using wind speeds and wind durations that might accompany summer storms. It appears from the Natural Resources Conservation Service nomogram of wave prediction curves provided by Mr.

English^[36] that three foot waves can be created by one hour of 60 mph winds over a three mile fetch. That happens once or twice a year at Hidden Haven.

26. DNR staff does not contend that the waves at Hidden Haven never exceed 2.21 feet. However, based upon Mr. English's experience, his opinion is that the limited incidents of higher wave height do not warrant an inland harbor.

27. All the inland harbor locations on Leech Lake approved by the DNR recently have had effective fetches of greater than eight miles.^[37]

The Inland Harbor

28. The Association had filed a previous application to construct an inland harbor in Outlot A on February 17, 2002.^[38] The previous application stated that the purpose of the project was to "eliminate 10 potential docks projecting out into Leech Lake" and to prevent property damage from floating bogs.^[39] The plans for the original harbor included 24 boat slips. The harbor would be dredged out to 1290 feet above sea level and connect with the lake through an entrance channel cut 20 feet wide and 68 feet long across the beach to the lake. The mouth and channel would be about 50 feet north of the gravel driveway. From the mouth of the harbor, an entrance channel 47 feet wide at the surface of the water would be dredged 130 feet into the lake. Two jetties extending 50 feet into the lake would be constructed to protect the entrance channel.^[40]

29. Mr. English visited Hidden Haven to inspect the site of the first proposed inland harbor on March 27, 2002, and June 18, 2002. On his June 18, 2002, site visit, he witnessed lake conditions at Hidden Haven with a strong south wind of about 20 mph and found the waves at the site to be "not at all menacing." Association representatives told him at that time that "they did not have a problem with wind and wave action." Mr. English found that the proposed harbor did not present any detriment to significant fish and wildlife habitat or vegetation.^[41] However, he believed the project did not comply with other rules, primarily Minn. R. 6115.0201, subp. 5.C., which requires a showing that the use of docks is precluded. Therefore, DNR staff denied the first permit application. The Association did not file a timely appeal of that denial.^[42]

30. The application under appeal in this matter increased the size of the proposed inland harbor proposal to 30 boat slips. The design of the entrance channel cut, jetties, and dredged channel extending 130 feet into the lake remained the same. The harbor would be 84 feet wide and 228 feet long. Construction of the harbor would require removal of the small wetland area surrounded by the loop in the gravel driveway and realignment of that part of the driveway, as well.^[43]

31. At the hearing, the Association proposed a third design, which widened the harbor to 100 feet, shortened the length to 100 feet and reduced the number of moorage spaces to 11. This change reduced the distance from the ordinary high water level to the most distance point from about 288 feet to about 169 feet, as measured on Exs. 53 and 100. It reduced the size from 18,120 sq. ft. to about 8,700 sq. ft. The

revised plan moves a five-space parking area to the area previously occupied by the other 19 boat slips and leaves the gravel driveway and small wetland as they currently exist. It leaves the channel cut, jetties, and dredged channel as previously designed.^[44] About 50.5 feet of the channel cut across the beach will be across the narrow peninsula of wetland that extends to the south end of Outlot A.^[45] Thus, the size of the wetland to be removed is about 1010 sq. ft. The smaller harbor itself may impinge on the wetland very slightly, but that is not clear.^[46] The Association did not propose any other changes to the current application.^[47]

Environmental Impacts and Alternatives

32. Under the amended plan, 1010 sq. ft of wetland would be removed for the channel cut. Under the original plan, the wetland within the driveway loop would also be removed. Wetlands improve water quality by capturing sediments which would otherwise enter the lake and reduce flooding by providing water storage capacity.^[48] The wetland in the driveway loop offers habitat for frogs and toads. The wetland within the channel cut provides habitat for mink, muskrat, waterfowl, warblers, and nuthatches and cover for larger upland animals.^[49] These wetlands benefit Leech Lake fisheries by improving water quality and increasing fish food production. The wetland within the channel cut area is part of a larger wetland extending throughout much of Outlot A and beyond and cutting through this section of the wetland could potentially drain a portion of the larger wetland into the channel cut.^[50]

33. An inland harbor would provide additional environment conducive to the establishment of invasive species, such as Eurasian Water Milfoil, which has already been discovered in five inland harbors on Leech Lake.^[51]

34. Dredging the entrance channel would impact fisheries. Regular maintenance dredging would be required due to the muck bottom in Boy Bay. Such dredging stirs up sediments, which settle on and kill aquatic vegetation used as habitat for fish and also smother fish eggs on the lake bottom.^[52] Moreover, the proposed jetties at the harbor entrance could interfere with littoral drift, the natural movement of sediments along the lakeshore. Mr. English testified that sediments may accumulate on the updrift side of the jetties and cause erosion of the shoreline on the downdrift side of the jetties.^[53]

35. DNR staff was unable to quantify the amount of these environmental impacts. The amount of wetland removed for the channel cut is very small, especially compared the very large amount of wetland that starts there and extends around Boy Bay. But it would still have an impact, particularly if the wetland actually did drain into the channel cut. Dredging the harbor, channel cut, and entrance channel would have relatively small, but still significant impacts upon the Leech Lake fishery.

36. The Association stated that its members would install ten docks along 200 feet of Outlot A if the application is denied. They would be placed in the emergent vegetation and muck along Outlot A and roads would be built through the wetland to access them. They don't wish to do that because of the aesthetics and because of the

environmental damage it would cause. As the Association agrees, this alternative could cause even more damage to the environment than an inland harbor.^[54]

37. To install the ten docks anywhere north of the southern 50 or so feet of Outlot A, the Association would have to obtain an aquatic plant management permit to clear emergent vegetation to create entrance channels to the lake. To build roads to the docks, the Association would have to obtain permits to built on the wetland. It is unlikely such permits would be issued. Moreover, placing docks in the much would be difficult or require floating docks. Thus, the option is not practical.

38. DNR staff strongly recommends the alternative of a multiple dock system placed at the south end of Outlot A. This could be one or two main docks extending from the area of the driveway, with several branches at which the boats could be moored and boat lifts placed. Such a system is used on Lake Bemidji, which is very similar in size to Boy Bay.^[55] Such a multiple dock system would have less impact on the environment than an inland harbor because it would not require dredging of the lake, removal of any wetland, or creation of quiet water.^[56] The cost of a multiple dock system, including the cost of hiring workers to put it in and remove it every season, would be far less than the cost of constructing and maintaining an inland harbor.

County Land Use Ordinance

39. Section 1705 of Cass County's Land Use Ordinance states, in relevant part:

A. Excavations for new inland harbors . . . shall require a Conditional Use Permit. The application for this conditional use permit must include:

. . .

3. An approved Department of Natural Resources permit for connection of the harbor to Protected Waters.

. . .

5. Harbors shall not be allowed in bluff zones or wetlands.

6. Harbors shall not extend landward of the OHW greater than 200 feet per Minnesota Rules, Chapter 6115.0201, Subd. 5, E., d.^[57]

40. Section 1705 A.6. of the ordinance is referring to Minn. R. 6115.0201, subp. 5.E.(1)(d), which states, in relevant part:

E. Excavations for development of inland harbors shall be limited to those waters described in item C and shall meet the following additional requirements:

(1) Requirements applicable to all commercial and industrial inland harbors:

. . .

(d) The excavation shall not extend more than 200 feet inland from the public water unless evidence is provided to show that greater distances are required because of the dimensions of the watercraft to be moored.

The proposed harbor is not a commercial or industrial inland harbor. Thus, the 200 foot criteria of the rule does not apply to the proposed harbor. And since the 200 foot restriction in the ordinance applies “per” the rule, the ordinance doesn’t apply to the proposed harbor either.

41. On July 3, 2003, John Sumption, Assistant Director of Cass County Environmental Services, sent Mr. English an email recommending denial of the application.^[58] He quoted the ordinance, then stated, “A large part of the proposed harbor area is designated as wetland which would violate #5 above. Thank you for the opportunity to comment.” Mr. Sumption testified at the hearing that he believes the project violates the County ordinance because it would be in a wetland and because it would extend more than 200 feet inland. He stated that the county normally recommends that applicants obtain DNR approval before seeking a conditional use permit and that conditional use permits are issued by the County Planning Commission.

Based upon the foregoing, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Natural Resources and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 103G.311, 103G.315 and 14.50.

2. The Department gave proper notice of the hearing and all relevant substantive and procedural requirements of law and rule have been fulfilled.

3. The Commissioner of Natural Resources has general authority to issue permits with or without conditions and to deny issuing permits.^[59]

4. A person must have a public waters permit to make any change in a waterway obstruction on public waters, including excavating in the beds of public waters.^[60]

5. The applicant for a permit has the burden of proving that the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare.^[61]

6. Minn. R. 6115.0201, subp. 5.C., provides, in relevant part:

C. Excavations for development of private inland harbors or boat slips serving fewer than 25 watercraft or watercraft less than 20 feet in length shall be limited to those waters where:

(1) Prevalent wind, wave, or current conditions along the shoreline where excavation is proposed are of a magnitude and frequency which precludes the use and maintenance of docks to moor watercraft. Determinations of magnitude and frequency which would inhibit use of docks shall be based on supporting facts including:

(a) the character of the water involved and its shoreline in relation to exposure to severe wind, wave, or current actions and the configuration and area of the water;

(b) the frequency of occurrence of storms producing severe winds and waves based on climatological data for the area; and

(c) the average number of days during each month of the navigational season when the shoreline is affected by severe winds, waves, or currents;

(2) The presence of lake bed and bank conditions would preclude the use and maintenance of docks and the conditions of the site and the number, type, or size of watercraft intended to be moored would preclude the development and use of on-land facilities, such as rollers, winch and track systems, sliderails, or other facilities which could be used to haul watercraft out of the water for on-land storage; or

(3) The proposed site is located in an area of the water body where offshore mooring or excavations or extensive dock development would create unreasonable obstructions to public use and navigation of the water body.

7. The prevalent wind, wave, or current conditions along the shoreline at Hidden Haven moving about the large floating bogs in Boy Bay create a threat to the shoreline of Hidden Haven that is significantly greater than the threat created by the prevalent wind, wave, or current conditions alone. But that threat is not sufficient to preclude the use and maintenance of docks to moor watercraft. Owners of most of the existing lots on Boy Bay have and intend to maintain the use of seasonal docks in the lake, in spite of the threat of the bogs and the severity of the wind and waves in the bay. Some would prefer to have a protected harbor if they could, but find the use of docks an acceptable risk. In the last five years, there has been only one incident of a very large floating bog causing damage in Boy Bay. There is no evidence as to whether any bog damage had occurred before 1999. The wind and wave levels on Boy Bay are similar to those on most lakes in Minnesota and do not preclude the use of docks. The floating bogs of Boy Bay increase the likelihood and likely damage from the wind and

waves, but the risk still remains very remote, which makes the use of docks viable. They are not precluded.

8. Minn. R. 6115.0200, subp. 1.A., makes it goal of the public waters program to, "limit the excavation of materials from the beds of public waters in order to . . . preserve the natural character of public waters and their shorelands, in order to minimize encroachment, change, or damage to the environment, particularly the ecosystem of the waters."

9. Minn. R. 6115.0200, subp. 3.C., prohibits excavation of harbors, "when the proposed excavation will be detrimental to significant fish and wildlife habitat and there are no feasible, practical, or ecologically acceptable means to mitigate the effects."^[62]

10. Minn. R. 6115.0200, subp. 5, items C. and F. require harbor excavations to meet the following criteria:

C. the proposed project represents the "minimal impact" solution to a specific need with respect to all other reasonable alternatives and does not exceed more than a minimum encroachment, change, or damage to the environment, particularly the ecology of the waters;

F. the biological character of the waters and surrounding shorelines is affected to the minimum degree feasible and practical;

11. The proposed inland harbor is inconsistent with all four of these very similar requirements. The harbor would permanently alter the shoreland, shoreline, and public waters of Leech Lake through the excavation, dredging, construction, and ongoing maintenance of the harbor, channel cut, entrance channel, and jetties. It would damage the environment, particularly the ecosystem of the waters, be detrimental to significant fish and wildlife habitat, and affect the biological character of the waters and surrounding shorelines. All of that is unnecessary because a reasonable alternative exists. Therefore, the harbor does not comply with Minn. R. 6115.0200, subps. 1.A., 3.C., 5.C., and 5.F.

12. Minn. R. 6115.0200, subp. 5, items I. and J. make harbor excavations subject to the following criteria, among others:

I. the proposed excavation is consistent with applicable floodplain, shoreland, and wild and scenic rivers management standards and ordinances for the waters involved;

J. the proposed excavation is consistent with plans and management programs of local and regional governments, provided that such plans are consistent with state plans and programs; . . .

13. It is not known whether a Conditional Use Permit would be issued for the proposed harbor under Section 1705 of the Cass County ordinance. Following the procedure preferred by the County, no formal application has been made to the County

yet and its Planning Commission is yet to make a determination as to whether to grant a CUP. DNR speculates that the CUP would be denied based upon Mr. Sumption's preliminary opinion that it would violate the construction in a wetland provision and the 200 foot restriction. Mr. Sumption's opinion was based upon an incorrect assumption that a "large part of the proposed harbor area is designated as wetland," and reliance upon a rule that does not apply to private inland harbors. The revised design impacts even less wetland and extends less than 200 feet from the OHWL. If DNR were to issue a permit, it is quite possible that the CUP would be issued. The permit should not be denied upon this basis. If a permit is issued, it should contain a condition requiring the Association to obtain a Conditional Use Permit from Cass County.

14. Minn. R. 6115.0200, subp. 5.K. requires harbor excavations to be appropriately sized to provide a single mooring space for each riparian lot to be served.

15. The proposed harbor exceeds the number of mooring spaces allowed and is oversized for ten mooring spaces that would be allowed. There are ten riparian lots to be served. The design submitted with the application provides 30 mooring spaces. The amended design submitted at the hearing provides 11 spaces, and has been widened for no apparent reason. Calling the extra mooring space a law enforcement space does not change the requirements. Conservation officers, deputy sheriffs, and rescue squads usually trailer their boats because they serve more than just one lake or need access at more than one location. Plus, there is a sheltered public access nearby law enforcement can easily use.

16. The proposed harbor does not comply with Minn. R. 6115.0200, subp. 5.K. If a permit is issued, it should contain a condition requiring the design to be modified to reduce the number of mooring space to ten and to reduce the size of the harbor to the minimum required. It would appear that the 20 westerly spaces could be cut off the 30 space design, leaving a harbor 84 feet wide and 85 feet long.

17. Because the use of docks is not precluded and because a reasonable alternative exists that will create less harm to the environment, the application must be denied.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED That the Commissioner of Natural Resources **AFFIRM** the denial of Permit Application No. 2003-1185 of Hidden Haven Homeowners Association, Inc.

Dated this 23rd day of December, 2004

s/Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Taped, 12 tapes, not transcribed

MEMORANDUM

The primary issue is whether the threat posed by floating bogs in Boy Bay is significant enough to preclude the use of docks. It is a close question.

DNR staff argues that floating bogs cannot be considered because they are not mentioned in the rules. But that is too narrow a reading. It is not the bogs alone that do the damage; it is not the winds, waves, and current action alone that does the damage. It is the combination. Therefore, both cause the damage. In the alternative, the floating bogs are certainly a "condition" of the water in the bay. Either way, if the threat is serious enough, docks would be precluded by the wind, waves, or current action.

In this case, the bogs do present an unusual threat and the Hidden Haven members are justified in worrying about it. A harbor would be nice. But bog damage has been so rare that it is not unreasonable to put out docks in spite of the risk. The rule requires that docks be "precluded." "Preclude" means to make impossible by necessary consequences.^[63] That is a very strong word and requires more than possible, occasional, damage.

S.M.M.

^[1] Exs. 11 and 54.

^[2] Ex. 3. In this and many other documents, the "Inc." is dropped from the Association name.

^[3] Ex. 10.

^[4] Ex. 1.

^[5] Ex. 3.

^[6] Ex. 10.

^[7] Subp 5.E. adds additional requirements that apply just to inland harbors, to the requirements in subp. 5.C. that apply to both harbors and boat slips. None of the additional requirements listed in Item E are at issue here and this citation is probably superfluous.

^[8] Exs. 26 and 51.

^[9] Testimony of Kirk English; Exs. 25, 26, 30, 51.

^[10] Testimony of Kirk English and others; Exs. 35, 36, 51, and 54.

^[11] Testimony of Dean Nordby and Randy Pelletier.

^[12] Ex. 11, p. 5.

^[13] Exs. 33, 34, and 100; Testimony of John Jaruszewski, Norm Card, Dean Nordby, and Randy Pelletier.

^[14] Testimony of Jerry Bader and Jeanette Welch.

^[15] Testimony of Kirk English; Ex. 21. *In the Matter of Phelps Harbor Excavation and Breakwater Construction*, Commissioner's Order, July 12, 1996.

^[16] See, e.g., Ex. 51.

^[17] Measured on Ex. 52.

^[18] Testimony of Randy Pelletier.

^[19] Ex. 112.

^[20] Exs. 58-60 and 103.

[21] Testimony of Randy Pelletier and Jeanette Welch; Exs. 102, 108-113, 125.

[22] Testimony of Dean Nordby, Norm Card, James Murphy, Dick Osgood, Kirk English, Randy Pelletier.

[23] Testimony of Harlan Fierstine

[24] Exs. 59 and 60.

[25] Testimony of James Murphy and Norm Card.

[26] Testimony of Kirk English.

[27] Testimony of Harlan Fierstine.

[28] DNR staff argues that the owner should have removed the canopy from the lift before the storm came up, erroneously assuming that removing a canopy can be done easily and quickly, and that the owner was present to do so.

[29] Testimony of John Jaruszewski and Randy Pelletier.

[30] Ex. 117.

[31] According to the Climatic Data Center's Web site, an F0 tornado has wind speeds of 35-82 knots (40-72 mph).

[32] The six largest in the state. See, the Land Management Information Center's Website: www.lmic.state.mn.us.

[33] Ex. 12, entry for 177.00 degrees.

[34] Ex. 56, entry for 177.00 degrees.

[35] Testimony of Kirk English.

[36] Ex. 49.

[37] Testimony of Kirk English; Exs. 62-65.

[38] Ex. 18.

[39] The form requires the description of the purpose to be brief.

[40] Testimony of Willis Hoyt.

[41] Testimony of Kirk English; Ex. 128 at 2.

[42] Testimony of Kirk English; Ex. 4.

[43] Ex. 53.

[44] Testimony of Willis Hoyt; Ex. 100.

[45] Testimony of Willis Hoyt.

[46] Testimony of Willis Hoyt; Ex. 38.

[47] DNR staff objected to the third set of plans as irrelevant to the appeal of the second application. The objection was overruled and the exhibit received because it appeared to address some of the deficiencies noted by DNR staff in the second design and made only one change (the length of the harbor) that could be easily evaluated and addressed by DNR staff. They could even more easily address the several design elements that were not changed and upon which their stronger objections were based. So there was no prejudice to DNR staff. Moreover, Minn. Stat. § 103G.315, subd. 5, states that design modifications can be required as a result of the permit process. The hearing is a continuation of the permit process. In the situation here, it would be putting form over substance to require an applicant to file an entirely new application to propose minor modifications to attempt to correct deficiencies the agency found in the project.

[48] Testimony of Kirk English.

[49] Testimony of Rob Naplin.

[50] Testimony of Harlan Fierstine.

[51] Testimony of Harlan Fierstine.

[52] Testimony of Harlan Fierstine.

[53] Testimony of Kirk English.

[54] Testimony of Dick Osgood and Dean Nordby; Ex. 107.

[55] Exs. 47 and 48.

[56] Testimony of Kirk English, Harlan Fierstine, and Rob Naplin.

[57] Ex. 20.

[58] Ex. 19.

[59] Minn. Stat. § 103G.315, subd. 1.

[60] Minn. Stat. § 103G.245, subd. 1.

[61] Minn. Stat. § 103G.315, subd. 6.

[62] This rule was not cited in the Order denying the application or in the Notice of Hearing. It was discussed at the hearing and argued in the briefs without objection.

^[63] Merriam-Webster OnLine.